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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 453

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–36) is reported at 334 F. 2d 539. The Board's decisions and orders (Pet. 37–140) are reported at 140 NLRB 1436 and 140 NLRB 1474.

JURISDICTION

The judgment of the court of appeals (Pet. 141–142) was entered on April 9, 1964. On June 30, 1964, Mr. Chief Justice Warren extended the time

for filing a petition for a writ of certiorari to and including September 6, 1964 (Pet. 143). The petition was filed on September 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 8(e) of the National Labor Relations Act, as amended in 1959, makes it an unfair labor practice for an employer and a labor organization to enter into an agreement "express or implied," whereby the employer agrees to "cease or refrain from handling * * * or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person" (a so-called "hot cargo" agreement). The questions presented are:

1. Whether contract clauses in which an employer relinquishes his right to discharge or discipline employees who refuse to handle "struck goods" or refuse to cross a picket line at a secondary employer's premises violate Section 8(e).

2. Whether Section 8(e) is arbitrary, in violation of the due process clause of the Fifth Amendment to the Constitution, because it exempts certain specified industries, and not others, from its terms.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at p. 144 of the petition.

STATEMENT

In March 1961, petitioner labor organizations—two locals of the International Brotherhood of Teamsters and its Central States Drivers Council and Southern Conference—entered into collective bargaining agreements with numerous employers engaged in the interstate transportation of freight by motor vehicle (R. I, 239–240; R. II, 391–393).[2] The agreements contained an article entitled "Protection of Rights," which was divided into two sections. Section 1, captioned "Picket Line," provided (R. I, 68–69; Pet. 40):[3]

> It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line, including the picket line of Unions party to this Agreement and including picket lines at the Employer's place or places of business.

Section 2, captioned "Struck Goods," provided in relevant part (R. I 69–70; Pet. 49, 51–52):

> Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other

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[2] Two separate cases—Nos. 17,662 and 17,663—were consolidated in the court of appeals. "R. I" refers to the joint appendix in No. 17,662, and "R. II," to the joint appendix in No. 17,663.

[3] There are minor wording variations in the clauses of the various agreements. The language of the Central States Local Cartage Agreement is set forth herein.

workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interests, the parties recognize and agree that:

* * * * *

[b] Likewise, it shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to handle any goods or equipment transported, interchanged, handled or used by any carrier or other person, whether a party to this Agreement or not, at any of whose terminals or places of business where there is a controversy between such carrier, or person, or its employees on the one hand and a Labor Union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating, interchanging or succeeding carriers or persons, whether parties to this Agreement or not.

[c] The Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable law, as a result of individual employees exercising their rights under this Agreement or under law, but the Employer shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, transport, or otherwise deal in such products and continue doing such business by use of other employees

(including management representatives), other carriers, or by any other method it deems appropriate or proper.

The General Counsel of the Board issued a complaint charging that the execution of the foregoing collective bargaining agreements constituted an unfair labor practice because the agreements were "hot cargo" contracts which are illegal under Section 8(e) of the Act (Pet. 60–61). The Board held that the "Picket Line" provision violated Section 8(e) because, by depriving the contracting employer (a neutral) of the right to discharge and replace employees who refused to cross a secondary picket line at his own premises or a picket line at the premises of another employer, the provision in effect committed the contracting employer to cease doing business with other employers who may be disfavored by the union (Pet. 39–49).[3] The Board further held that the above clauses of the "Struck Goods" provision also violated Section 8(e). It ruled that, by precluding the con-

[3] However, the Board added that a picket line clause which sanctioned refusals to cross a picket line at the premises of another employer would not be unlawful if it were limited to a situation where the employees of that employer were engaged in a strike ratified or approved by their duly authorized representative. The Board so concluded because, in its view, the picket line proviso to Section 8(b)(4)—which provides that "nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act"—qualified Section 8(e) no less than the companion Section 8(b)(4)(B). (Pet. 43–48.)

tracting employer from using his regular employees to handle the goods of persons disfavored by the union, these clauses amounted to an agreement by the contracting employer to cease doing business with such disfavored persons (Pet. 51–54, 104–105).[4]

The Board ordered the petitioner unions to cease and desist from maintaining or enforcing the contract clauses found to be illegal, or any other agreement violating Section 8(e), and to post appropriate notices (Pet. 55–58, 107–110).

The court of appeals agreed with the Board that the "Struck Work" clause violated Section 8(e). (Pet. 30–31.) It also agreed that the "Picket Line" provision violated that section insofar as it would protect employees against discharge for refusing to cross a secondary picket line. The court concluded, however, that, insofar as the clause applied to refusals to cross a primary picket line at another employer's premises, it was directed against "primary" activity and thus was valid because it was outside the purview of Section 8(e). The court, accordingly, modified the Board's order with respect to the "Picket Line" provision. (Pet. 21–27, 35–36.)[5]

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[4] The Board further found that certain other provisions of the contracts—the "ally," "subcontracting," and "hazardous work" clauses—also violated Section 8(e) (Pet. 49–51, 54–55, 198). The court of appeals sustained the Board on the "ally clause," rejected its finding on the "subcontracting clause," and remanded for further proceedings respecting the "hazardous work clause" (Pet. 29–30, 32–34). The petition raises no question respecting the court's disposition of these clauses.

[5] The Board has decided not to seek certiorari with respect to the portions of the court's decision adverse to it.

ARGUMENT

1. The court of appeals correctly upheld the Board's conclusion that the "Struck Goods" provision, under which the contracting employer agreed not to discharge or discipline his employees if they refused to handle any goods coming from a person engaged in a labor dispute, violated Section 8(e) of the Act.

Section 8(e) prohibits any agreement "express or implied" whereby an employer undertakes "to cease or refrain from handling * * * the products of any other employer, or to cease doing business with any other person." As the court below pointed out in *Los Angeles Mailers Union No. 9* v. *National Labor Relations Board*, 311 F. 2d 121 (C.A.D.C.), involving a similar provision, since "the employer functions through his employees," when "he enters into an agreement with their representative that they are not to handle the products referred to, the agreement as a practical matter must be held to contemplate that the employer is not to do so" (p. 124). In other words, if the employer is precluded from discharging employees who refuse to handle goods of certain other employers, the practical effect is to force him not to deal with those employers, since he could deal with them to the same extent as before only by incurring the added expense and inconvenience of hiring additional employees to handle their products. See, also, *Employing Lithographers of Greater Miami* v. *National Labor Relations Board*, 301 F. 2d 20, 29-30 (C.A. 5) ("Trade Shop" and "Refusal to Handle" clauses) and *National Labor*

Relations Board v. *Amalgamated Lithographers of America*, 339 F. 2d 31, 41–42 (C.A. 9), certiorari denied, 379 U.S. 943 ("Termination" and "Refusal to Handle" clauses), where the courts ruled that similar clauses violated Section 8(e). This conclusion, moreover, is consistent with the legislative history of the section, which shows that Congress intended to enact a broad and comprehensive ban against "hot cargo" agreements, and equated "'employee-rights' clauses with other hot cargo clauses" (Pet. 31). See the history cited by the court below, Pet. 21; and note the clauses in *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 95, 97.

There is no substance to petitioners' contention (Pet. 11–12) that the "Struck Goods" provision is primary and outside the purview of Section 8(e) because its basic purpose was merely to protect employees of the contracting employer who might have personal convictions against handling goods and equipment coming from employers involved in labor disputes. Even assuming that this was an object of the clause, such attempts to protect these "individual rights" must comply with the statute. Although individual employees may have a right to decide for themselves not to handle certain goods, their employer has the correlative right to replace them with other employees who will handle the goods. The "Struck Goods" clause, by depriving the employer of this choice, goes beyond protection of the rights of the individual employees and compels the contracting employer to cease doing business with employers disfavored by the union. It is the policy of Section

8(e) to prohibit contractual arrangements between the union and the employer that commit the latter to such a response whenever the persons with whom it does business become involved in a labor dispute.

Nor is a different conclusion required because paragraph (c) of the "Struck Goods" clause provided that the contracting employer would continue to deal with the struck employer and, in the event of a refusal by the former's employees to handle the latter's goods, would undertake to handle them by other means (see Pet. 14–15). As the Board pointed out (Pet. 88–89), "no matter what expedient allowed by the 'continued business' clause the carrier used to carry on business with the struck employer, the normal, efficient and profitable operation of his business would be disrupted to that extent. It cannot be assumed that he would long continue to do business with the struck employer under such handicaps."

2. The court of appeals was also correct in concluding that the "Picket Line" provision violated Section 8(e) insofar as it protected employees against discharge for refusing to cross a secondary picket line. Absent a contract provision, an employer, so long as he is motivated by business considerations, is free to replace employees who are unwilling to cross a picket line with those who are willing to do so.* As the Board pointed out (Pet. 43), the "Picket

* See *Redwing Carriers*, 137 NLRB 1545, affirmed *sub nom. Teamsters Local Union No. 79* v. *National Labor Relations Board*, 325 F. 2d 1011 (C.A. D.C.), certiorari denied, 377 U.S. 905; cf. *National Labor Relations Board* v. *Cone Brothers Contracting Co.*, 317 F. 2d 3 (C.A. 5), certiorari denied, 375 U.S. 945.

Line" clause, by "denying to an employer his privilege of replacing employees who refuse to carry out their assigned duties," in effect requires "the employer to agree to cease or to refrain from handling the products of, or otherwise dealing with the employer whose products or services are under the union's ban." Such a clause thus falls within the literal prohibition of Section 8(e). However, Section 8(e), like the companion Section 8(b)(4)(B),[7] must be construed so as not to interdict legitimate primary activity. Since refusals to cross a primary picket line are a normal incident of such activity,[8] the operation of the "Picket Line" clause in connection with a primary picket line may properly be deemed to fall outside the purview of Section 8(e).[9] But, insofar as the "Picket Line" clause would privilege refusals to cross a secondary picket line, it was properly subjected to the prohibition of Section 8(e). As the court below pointed out (Pet. 22): "Refusal

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[7] Section 8(b)(4)(B) makes it unlawful for a labor organization to induce an individual to strike, or to threaten, coerce, or restrain any person, for an object of forcing that person "to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

[8] See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665; *United Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492.

[9] The court below rejected the Board's position that a picket line clause, even if limited to a primary picket line, would be "exempt" from Section 8(e) only insofar as it complied with the requirements of the proviso to Section 8(b) (pp. 5, 6, *supra*).

to cross that line would itself be secondary activity. To the extent that the clause would protect such refusal to cross, it would then be authorizing a secondary strike and would *pro tanto* be void under § 8(e) of the Act."

The considerations that petitioners urge (Pet. 15–17) do not justify a different conclusion. Since the effect of the "Picket Line" provision is to compel an employer to cease dealing with other employers with whom the Union has a labor dispute, it is just as immaterial here as it is with respect to the "Struck Goods" provision that the Union may have been seeking only to protect "individual employee" rights. The difficulties that employees may sometimes encounter in ascertaining whether picketing is primary or secondary, and hence in knowing whether refusing to cross the picket line is likely to lead to loss of their jobs, may be encountered in other contexts, and are not sufficiently serious to show that Congress did not intend to prohibit a "Picket Line" clause to the extent here condemned. The fact that secondary activity may be reached under other provisions of the Act does not indicate that Congress did not also intend to deal with it by prohibiting "Picket Line" clauses that sanction secondary pressure. Finally, the cases relied on by petitioner (Pet. 16–17) all involved a refusal to cross a primary picket line, and none involved the validity of a picket line clause.

3. There is no substance to petitioners' contention (Pet. 17) that Section 8(e) violates the Fifth Amendment. The argument is that Congress acted arbitrar-

ily and unreasonably in exempting from the prohibitions of the section only two industries—the garment and the construction industries (Pet. 17). But, as the court below stated (Pet. 24): "Courts today no longer sit in review of the economic wisdom of the distinctions drawn by the legislature, and the failure to grant exemption from § 8(e) to all industries which claim they merit an exemption does not void the Act. In this connection, we note that the unions in the trucking industry were the prime target of congressional concern."[a] The same contention has been rejected by the two other courts of appeals that have considered it. See *Employing Lithographers of Greater Miami* v. *National Labor Relations Board*, 301 F. 2d 20, 24–27 (C.A. 5); *National Labor Relations Board* v. *Amalgamated Lithographers of America*, 309 F. 2d 31, 45 (C.A. 9), certiorari denied, 372 U.S. 943.

[a] The legislative history of Section 8(e) is summarized in Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1118.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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